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4/15/98

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April 15, 1998

VIA FACSIMILE AND FEDERAL EXPRESS

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RE: Valleycrest Landfill - Cargill, et al. v. Abco, et al.

Dear Mr. Stamp:

This letter is being sent by the undersigned on behalf of the Defendants listed in Exhibit A to this letter. Some of these Defendants are represented by our respective firms and some are not. This group of Defendants have a number of common issues and objections to the current allocation scheme proposed by the VLSG. We thought that we would highlight some of those issues for you in the following sections of this letter. This is not designed to be an exhaustive or all-inclusive discussion of the issues these Defendants have, but designed to start a dialog with the VLSG that may result in an acceptable resolution. We think you will see from the closing paragraph of this letter that this group of Defendants does not want to engage in acrimonious litigation from the outset, but would prefer to engage in meaningful negotiations. Please review the following sections with that in mind:

1. FAILURE TO ALLOW FOR CONTINGENT OFFERS TO JOIN GROUP

The process orchestrated by you and your clients is questioned by these Defendants because it calls for all Defendants to commit to a "share" or a "tier" before the corresponding financial liability is determined. Without knowing how many other "shares" are participating, a Defendant cannot estimate its financial exposure of participating. This methodology is unacceptable to these Defendants, all of whom believe that the financial component is an integral part of any allocation process. Unfortunately, you have shown an unwillingness to resolve this issue by considering "contingent" offers that some Defendants have proposed to make.

2. FAILURE TO PROVIDE AN ACCOUNTING OF COSTS

VLSG has not provided the Generator Defendants with a written itemization of past, nor a breakdown of estimated future, RI/FS (and removal action) costs. VLSG asserts that it has spent $2 million to date and estimates an additional $2.2 million will be necessary to complete the RI/FS process. Needless to say, such costs are significant. It simply is unreasonable to demand that the Defendants commit to pay a share of such costs (unspecified in amount at that) without, at the very least, providing a detailed accounting of such costs.

It is difficult enough to explain to one's management the concept of CERCLA liability, but to expect management to accept on blind faith the costs being allocated and what one's share of those costs ultimately will be is out of the question.

3. THE PROPOSED TIER SCHEME IS UNFAIR

Plaintiffs' allocation does not contain enough tiers. The disparity in the amount and nature of wastes generated among the various Defendants is too great to be accounted for by only four tiers (plus a de minimis category). First, under the present scheme, it appears that generators of significantly different types of wastes, different volumes of waste, generated over different lengths of time, may be placed within the same tier, and thus asked to make the same financial contribution. That is unpalatable. Second, it appears that there are a handful of Generator PRPs who bear a significantly higher equitable share of liability than the remainder. Consequently, those Generator PRPs should be placed in a separate tier.

Increasing the number of tiers will produce a fairer, more accurate assignment of costs, assuming of course, appropriate allocation criteria are used.

A second consequence of establishing only four tiers is an inflated "de minimis" buy-out figure. $7,500, absent more complete information from VLSG, is excessive. Increasing the number of tiers would facilitate a lowering of the de minimis buy-out, which in turn will encourage participation.

Another troubling aspect is the description provided for distinguishing the tiers in which each Defendant belongs. In reviewing this description and comparing it to the "evidence" provided in each Defendant's packet, we were unable to "tier" the Defendants

listed in Exhibit A in any rational fashion. We'd like to discuss how the VLSG was able to do this. It was extremely difficult to determine any tiering distinctions based on the limited criteria provided by the VLSG. Obviously, this raises fundamental questions as to the reasonableness and fairness of the VLSG's methodology

4. THE GENERATOR SHARE OF SITE COSTS IS UNREASONABLY HIGH

The VLSG's proposed allocation provides that the class of generator PRPs shall be responsible for 47% of total site costs. The proposal offers no rationale as to why this generator class allocation is reasonable, nor does it explain what percentages have been allocated to other PRP classes such as transporters or owner/operators. (We note that the proposed 47% generator share is significantly higher than the generator-class shares proposed at another local NPL site, the Powell Road Landfill.) Moreover, the proposal makes no reference to any municipal PRP allocation, although we presume that a separate allocation is being considered for municipal PRPs. Assuming municipal liability is to be capped, the VLSG proposed allocation makes no provision as to how the municipal PRP allocation will affect the other PRP classes.

5. THE PROCESS IS FUNDAMENTALLY FLAWED

Another concern that these Defendants have expressed is that the tiers of the various plaintiffs have not been delineated with specificity. These Defendants have found that one of the key factors in analyzing the proposed settlement is the relative placement of *all* other participants in the action. This includes an analysis of the evidence related to the Plaintiffs' participation in the Landfill, and the corresponding tiers in which those Plaintiffs have been placed. It is impossible for these Defendants to judge in relative terms their own liability when they do not have all the facts regarding the relative liability of all of the other participants in the action. For instance, Defendant X is not going to be willing to accept his placement in a tier until he knows that Plaintiff Y, regarding whom Defendant X has seen much incriminating evidence, is placed in an appropriate tier ahead of him.

This "relative analysis" is used by courts themselves when dealing with allocation issues. Most of us recognize the "Gore" factor analysis used over the years by courts in order to determine the liability of parties involved in Superfund cases. Many, if not all of the Gore factors are relativity-driven. They assume an analysis to be completed by weighing the

evidence as it pertains to each participant *relative to* that of the next participant. For example, one of the Gore factors (among others) involves an analysis by the court of the degree of involvement of the parties in the generation, transportation, treatment, storage or disposal of hazardous waste. This factor clearly involves an analysis of the degree of involvement of each party relative to the involvement of each other party. The Gore factors should have been a focal point of Plaintiffs' counsel in the development of the tiering system in this case. Without information as to the respective tiers of the Plaintiffs, however, the Defendants in this case cannot evaluate properly their own relative placement within that tiering system. The specific tier categories of each of the Plaintiffs therefore, must be delineated.

The lack of information disseminated regarding the Plaintiffs' specific relative liability only calls into question further the lack of impartiality inherent in a tiering system developed by interested parties. Despite the fact that you believe the tiering system to achieve some sort of "global justice," you represent interested parties in the case and therefore your vision of "justice" is necessarily going to differ from that of the Defendants in the case. While these Defendants are aware that you have conveyed certain factual bases upon which your tiering decisions were made, it is difficult for them to believe that the process was completely objective, a presumption seemingly confirmed by the fact that you have not delineated the tiers into which your own clients fall. When the allocator is not an independent objective party, that allocator should expect a heightened level of scrutiny. Complete openness is the only hope of successfully negotiating an allocation methodology that will pass judicial scrutiny. The Union Electric cases out of the Eighth Circuit are particularly instructive regarding the issues of substantive and procedural fairness in developing allocation formulas. This would include, among other things, notice and a fair opportunity for parties to participate in determining the allocation formula. Your proposal and process to date falls woefully short of the elementary standards used by most courts.

6. FAILURE TO PROVIDE AN AGREEMENT TO DISMISS LAWSUIT OR A COVENANT NOT TO SUE

Even if a Defendant were inclined to join the PRP Group, the Site Participation Agreement does not explicitly provide that the VLSG will dismiss the lawsuit against that PRP. Nor does the Agreement include a covenant that members of the group will not sue other members. Although the VLSG has indicated that both of these protections are provided

in Section 6.6 of the Agreement, which pertains to the assignment of claims, this provision provides inadequate protection. The first sentence contains, in what appears to be a typographical error, language that makes the meaning of the entire provision ambiguous. (It refers to an undefined term "Original New Operator Members", when it probably means "Original Members, New Operator Members..."). Even if this typographical error were not made, the Agreement needs to contain explicit dismissal and covenant not to sue provisions to adequately protect potential new Group members. Additionally, we believe "de minimis" parties will require contribution protection and indemnity from the plaintiffs, which is not provided by the Participation Agreement.

Notwithstanding the criticisms voiced above, we agree with the VLSG that to avoid lengthy litigation and high transaction costs it may be in everyone's interest to form a viable PRP group that can continue the RI/FS work and remediate the Valleycrest site. We are confident that such a group can be created, but only if the PRPs are comfortable with the allocation process and are assured that a substantial portion of the PRPs will join. Once we arrive at an acceptable allocation, we can then address the negotiation of the Participation Agreement.

Through good faith negotiations with VLSG, we believe that we can achieve both of these critical elements. By May 5, 1998, we would like to meet with the VLSG to discuss how we can collectively form a viable PRP group in the most expeditious manner possible. To better ensure that we are all focused on these discussions, we ask that the VLSG postpone serving its complaint on any PRPs until June 1, 1998.

Very truly yours,

Timothy D. Hoffman

Very truly yours,

J. Wray Blattner
Thompson, Hine & Flory

TDH:mjsj

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EXHIBIT A

1. Amcast Industrial Corporation
2. Bendix Corporation
3. Bridgestone/Firestone, Inc.
4. Children's Medical Center
5. DAP
6. Dayton Forging & Heat Treating Company
7. Dayton Industrial Drum
8. Enterprise Roofing and Sheet Metal Company
9. F&M Contractors, Inc.
10. Fenton Foundry Supply Co., Inc.
11. Fryman-Kuck General Contractors, Inc.
12. Gayston Corporation
13. Gem City Engineering
14. Beverages of Dayton, Inc., d/b/a Pepsi-Cola Bottlers of Dayton
15. Grismer Tire
16. High Tech Castings, Inc.
17. Hyland Machine Co.
18. James River Corporation
19. Matlack, Inc.
20. The Mazer Corporation
21. Miami Products & Chemical Company
22. Monarch Marking Systems, Inc.
23. Oberer Development Company
24. Pantorium Cleaners, Inc.
25. Stolle Corporation
26. Systech Environmental Corporation
27. Tomkins Industries, Inc.
28. TRU Foto, Inc.
29. TRW, Inc.

30. United Parcel Service, Inc.

31 Van Dyne Crotty, Inc.

32. Williams Brothers Roofing & Siding Company

33. Yale Industries